Supreme Court U.S.
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No. 96-1605

In The

Supreme Court of the United States

October Term, 1996

BEAR VALLEY CHURCH OF CHRIST,
a Colorado non-profit corporation,

Petitioner,

v.

DENISE DEBOSE, and J.D.B., a minor child,
by and through his parent and next friend,
Denise DeBose,
and
HOMER WOLFE,

Respondents.

Petition For A Writ Of Certiorari
To The Supreme Court Of Colorado

PETITIONER'S REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI

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13 pp

TABLE OF CONTENTS

Page

RESPONDENTS' STATEMENT OF THE CASE..... 1

REASONS FOR GRANTING THE WRIT..... 6

I. This case cries out for certiorari review because the Colorado Supreme Court opinion is not only inconsistent with this Court's prior pronouncements, but a multitude of other jurisdictions who have considered this very issue. Further, this issue is being litigated with ever-increasing frequency in state and federal courts 6

A. The Colorado Supreme Court's opinion in this case invades religious beliefs and practices, not secular conduct 8

II. Contrary to the Colorado Supreme Court and the Respondents in this case, the Colorado Court of Appeals found the Respondents' expert witnesses invaded religious beliefs 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988)..... 7

Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), *cert. den.*, ___ U.S. ___, 114 S. Ct. 2153 (1994)..... 6

Roman Catholic Bishop v. Superior Court, 50 Cal. Rptr. 2d 399 (Cal. App. 4th Dist. 1996)..... 7

Sanders v. Casa View Baptist Church, 898 F. Supp. 1169 (N. D. Texas 1995)..... 7

Swanson v. Roman Catholic Bishop of Portland, et al., ___ A.2d ___ (Maine 1997) 1997 W.L. 19707..... 6

Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996) 7

RESPONDENTS' STATEMENT OF THE CASE

Respondents' allegation in paragraph one " . . . antecedent knowledge of Bear Valley that Wolfe had sexually approached other vulnerable children," repeated on page 10 is specifically denied by the Bear Valley Church of Christ, as the only "antecedent knowledge" held by the church up and through the time of the discharge of Homer Wolfe as a minister at the church was the written concern of Mr. and Mrs. Wygal, which does not support the position that "Wolfe had sexually approached other vulnerable children," See Petition, Appendix D, pages 42 through 43.

Respondents' Brief, beginning at page 2, states that facts in the Petition of the church were incorrect in four specific areas. Each will be addressed.

First, the point in the Petition was that J.D.B. did not recall seeing Wolfe in 1987 or 1988, not an effort to claim he may not have seen Wolfe in those years for counseling. The point of the Petition statement was that all J.D.B.'s statements concerning the conduct of Wolfe in counseling with him related therefore to events before 1987. J.D.B.'s own testimony was "after I went – I started going to Deer Creek, I don't, I don't remember seeing him much after that." He started attending Deer Creek in 1987 pursuant to his own testimony. The Wygals first raised their concern in June 1987.

Second, the record does not support Respondents' statement that there was more than one incident of contact claimed by J.D.B. of his genitals by Wolfe. J.D.B. did not allege his genitals were touched when his mother spoke to him in June 1988 about Wolfe's counseling. J.D.B. did not claim he was touched on the genitals in his three or four counseling sessions with Randy Simms in June 1988. J.D.B. denied under oath in his deposition in this case of January 3, 1992 that touching of the genitals had occurred and he testified in his deposition his thigh had been rubbed only once. The first mention of touching his penis was to Dr. Kathy Morall, a psychiatrist hired by the DeBoses for trial, who saw J.D.B. once on April 9, 1992. However, J.D.B. never mentioned this inflammatory fact to Dr. Frye on April 6, 1992, April 7, 1992, or April 10, 1992, when

seen at the request of the church. At trial, J.D.B. testified to his counsel's questions:

> "Q. John, do you remember telling Kathy – Dr. Morall that Homer Wolfe touched your privates?
>
> A. Yes.
>
> Q. Was that true?
>
> A. Yes.
>
> Q. Explain to the jury what you told Dr. Morall.
>
> A. He would just rub my leg up to my side and just touch my penis and then . . . " (this is the complete answer given).
>
> V.8:114:15-22.

Dr. Kathy Morall testified to J.D.B. counsel's questions:

> "Q. What did he tell you?
>
> A. . . . But he indicated that after the second or third visit that Mr. Wolfe had asked him to remove his shirt, that there had been some back rubbing, that he had asked him to sit on his lap, and that, again, he would stroke his body, and that *on at least one occasion he massaged and stroked his thigh and also touched his penis.* He said privates." (emphasis supplied) V.8:59:5, 18-24.

J.D.B. also testified at trial, when under cross-examination concerning his group counseling sessions instituted after January 3, 1992:

> "Q. Do those other kids talk about some very serious things that have happened to them?
>
> A. Yes.
>
> Q. And you believe that has helped you remember more about your sessions with Homer?
>
> A. Not really that, but it was just – I remember some of the stuff for the trial and stuff.
>
> Q. Who has talked to you about the visits of Homer Wolfe?
>
> A. Just my lawyer.
>
> Q. Just your lawyer. How about your mother?
>
> A. She just talked to my lawyer first, I guess.

Q. Okay. Your mother hasn't talked to you about the visits with Homer Wolfe?

A. After she talked to my lawyer, she –

Q. Excuse me, I didn't hear the last part.

A. She would talk to me, I guess. I wouldn't talk back because you don't –

Q. You don't speak back to your mother?

A. No, not a whole lot.

Q. You just listen to what she has to say?

A. Yes." V.8:132:1-22.

Dr. Frye testified on direct at trial:

"Q. In other words, your last visit with John was the day after he had seen Kathy Morall?

A. Yes.

Q. And at that time he revealed nothing about having – his penis having been touched?

A. That's correct. And I believe I opened my third session with the way I usually begin a final meeting with someone I'm evaluating – I'm reading from my own notes – any points – 'Are there any points you want to talk about?' Again, implying we met twice; did we leave something out that is a telling, important matter that you wish to bring to my attention. Again, this would be John or any person I'm evaluating. And John's answer was, I'm upset because I have to go to court because Homer Wolfe touched – rubbed my back and legs. I don't think Homer was – really was a trained counselor to want to touch people and so forth, which I said before. He did not bring up a new piece of information, even in the face of my asking him open-ended questions in that final meeting.

And toward the end of that final session, again, before we closed up, as I would always do, I wanted to see if there's anything we may have overlooked. And my final – I asked: 'Are there things that make you sad?' Again, the very open-ended question that could bring up whatever was left that may still

> wasn't – hadn't been touched. And John's answer was, 'Moving to Nebraska; leaving my friends in Denver; my grades, although I'm doing better this year. I'm doing that because I want to do better with my life and not be a bum.' That's what I was trying to find earlier in my testimony." V.13:174, 1-25:175, 1-6.

Third, Respondents' allegations of known "misconduct" against Wolfe before he was fired in 1988, is a totally unfair characterization of facts. The Respondents' mention of the brief April 1986 discussion of the Elders with Wolfe involving "medical counseling" before the Wygals' concern over "medical counseling" does not equate to "misconduct." "Medical counseling" is not ipso facto improper sexually motivated activity.

Attached to the Petition as Appendix D is the very document given to the elders in June 1987 by Mr. and Mrs. Wygal. It should be noted item six on Appendix D states: "6: Why the *discussion* of Gary Don's own private parts? (emphasis supplied)

However, by the time of the depositions of Mr. and Mrs. Wygal on March 5, 1992, which was the testimony read to the jury over the defendant's objections, it became the following:

> "Q. And you indicate that had Mr. Wolfe asked to – what did you say he asked your son?
>
> A. He asked to see – *he asked to examine* my son to see if he was properly circumcised.
>
> Q. Your son told you that?
>
> A. Yes.
>
> Q. You told the Elders?
>
> A. Pardon me. My son told my wife, and my wife told me this.
>
> Q. Then did you and your wife relate that to the Elders at some point?
>
> A. Yes." (emphasis added) V.8:11-12:17-25, 1-3.

Note that in their original written concern in 1987 it was a "discussion" of private parts and by the time of the deposition in 1992, some almost five years later, it had become "examine," and this was admitted into evidence based on double hearsay.

Four, Respondents allege the Elders did not really suspend the counseling of Wolfe. In the Petition at Appendix F is the letter suspending Wolfe's counsel on March 23, 1988 written by Elder Jerry W. Taylor. Wolfe testified at the time of trial on Plaintiffs' counsel's questions:

> "Q. Mr. Wolfe, haven't you said that Harry Denewiler (Elder) told you you could keep counseling?
>
> A. As I recall, I communicated with him after receiving the letter that that would be unfair to some of my clients, that they were desperately in need of the help, that they would be badly harmed if we discontinued suddenly without a good cause and asked if he would ask the Elders to consider allowing me to continue with some of my people with hard-core problems.
>
> Q. People with hard-core problems?
>
> A. First time I ever thought of it in those terms. People that were sensitive and needed some emotional stability.
>
> Q. And they agreed to do that?
>
> A. Yes, they did." V.9:99, 12-25:100, 1.

Respondents' Brief also brings up the testimony allowed over objection by trial court and approved by the appellate court and Supreme Court of the State of Colorado of Wade Wright. Wade Wright came forward in December 1989, one and one-half years after Wolfe was discharged by the Elders. Wright claimed he had counseled with Wolfe for one hour in 1981 or 1982 at age 12, following his 12 year old cousin's death. He alleged Wolfe had him remove his shirt and pants, then lay down on the floor, while Wolfe massaged his arms, back and legs. Wolfe also allegedly checked his circumcision. Wright told no one about this counseling session for over ten years, despite the fact his grandfather was a church Elder.

Page six of the Respondents' Brief establishes the alleged grounds upon which they claim a right of avoidance of the First Amendment by alleging the case is grounded against the church on their "decision to keep Wolfe's methods secret from the congregation." However, claims made against the church

were actually upon theories of negligent hiring, negligent supervision, breach of fiduciary duty and vicarious liability by way of ratification. There was no "decision" to keep Wolfe's counseling methods a secret from the congregation. The Elders discussed the Wygals' concerns with Wolfe and spoke to adults such as Magyar, who were counseling with Wolfe.

REASONS FOR GRANTING THE WRIT

I. This case cries out for certiorari review because the Colorado Supreme Court opinion is not only inconsistent with this Court's prior pronouncements, but a multitude of other jurisdictions who have considered this very issue. Further, this issue is being litigated with ever-increasing frequency in state and federal courts.

In the very recent decision on April 4, 1997 of the Supreme Judicial Court of Maine, in the case of *Swanson v. The Roman Catholic Bishop of Portland, et al.*, ___ A.2d ___ (Maine 1997), 1997 W.L. 19707, the court found it unconstitutional to bring a claim of negligent supervision against a church when it was presented for the first time with the question of whether courts may constitutionally impose and enforce a duty of an employee's supervision derived from secular agency principles against a religious organization.[1] The facts of the case are remarkably similar to those in *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), *cert. den.*, ___ U.S. ___, 114 S. Ct. 2153 (1994), which was discussed and soundly rejected by the Maine Court. Just as the Respondents in this case claim, plaintiffs in the *Swanson* case alleged that the claim for negligent supervision against the church could be resolved by the application of neutral tort principles. They argued that inquiry into the church's knowledge of the risk presented by the priest and the reasonableness of the church's

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[1] The Superior Court of Maine had dismissed the claim against the church for negligent selection and training of the priest, but had denied the motion to dismiss the claim for negligent supervision.

supervisory acts involved nothing beyond the application of secular legal standards to secular conduct. The Maine Court pointed out: " . . . Clergy members cannot be treated in the law as though they were common law employees," and concluded that

> " . . . On the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the matter deemed proper by the ecclesiastical authorities and was not a societal interest sufficient to overcome the religious freedoms inhibited."

In the case of *Roman Catholic Bishop v. Superior Court,* 50 Cal. Rptr. 2d 399 (Cal. App. 4th Dist. 1996), the California Court on a writ of mandamus granted the church's motion for summary judgment on the basis (1) the child failed to establish the church could have uncovered any facts that would have shown an undue risk of harm the priest would commit criminal child sexual abuse if he were employed by the church (one of the church's positions in the present case in response to the alleged standard set forth in *Van Osdol v. Vogt,* 908 P.2d 1122 (Colo. 1996) by the Colorado Supreme Court at footnote 17. However, in this case the Supreme Court of Colorado has entirely failed to follow its own pronouncement.); (2) the church could not have required the priest to review his prior sexual behavior under his rights of privacy; and (3) the church had no civil duty to supervise the priest's vow of celibacy, which is a religious duty. [This is contrary to the very basis of the Colorado Supreme Court's first case holding in *Destafano v. Grabrian,* 763 P.2d 275 (Colo. 1988).]

In *Sanders v. Casa View Baptist Church,* 898 F. Supp. 1169 (N. D. Texas 1995), the church was granted summary judgment regarding a minister's improper sexual conduct with two women on claims of infliction of emotional distress, breach of fiduciary duty, negligence in hiring, retention and supervision, as well as Title VII retaliation and sexual harassment claims.

The effect of the First Amendment religious clauses on a church's tort liability for out of course and scope activity of clergy in sexual misconduct is an area of litigation which is prolifigating across all jurisdictions, the majority of which have taken the position of the Petitioner in this case before the Court. This Honorable Court accepting certiorari will result in the settling of the law across all jurisdictions and save vast amounts of judicial time, as well as that of potential litigants involved in the issue.

A. The Colorado Supreme Court's opinion in this case invades religious beliefs and practices, not secular conduct.

The Respondents in this case base their claim against the Bear Valley Church of Christ on the premise the religious belief and practices involved of the church were not religious, but were secular conduct. The conduct of the church involved in this case was the hiring, supervision, disciplining and discharge of clergy, its intermediary between man and God, and having this intermediary between man and God conduct the sacred communication of pastoral counseling. The mere boldface claim of the Respondents that these activities of the church are not religious activities generated by a religious belief and then labeling their second-guessing of the church conduct as tortious conduct is extremely transparent on its face. A church's dealings with their canonical appointment and subsequent acts of its intermediary between man and God and in having this individual conduct the sacred communication of pastoral counseling is, per se, the exercise of religion based on sincerely held religious belief. The Respondents' attempt to relabel these events is a sham and subterfuge to avoid the First Amendment and avoid the previously pronounced decision of this Honorable Court which have been honored in the majority of jurisdictions to consider the issue, but not in Colorado.

The Respondents' many statements that there was no inquiry into religious beliefs in this case ignores that the Respondents were allowed in the trial to question the adequacy

of the Elders' knowledge of Wolfe's background when appointing him, to question the qualifications of Wolfe to conduct the sacred communication of pastoral counseling, to claim Wolfe's methods of pastoral counseling was below the standard for secular counseling, to question the right of the Elders even to permit pastoral counseling by Wolfe, to question the right of Wolfe to touch people in pastoral counseling, to claim a clergy person must be supervised in conducting pastoral counseling, to claim the Elders as mere lay persons were not, by experience and education, qualified to supervise Wolfe in pastoral counseling, to claim the Elders' supervision of Wolfe in pastoral counseling was a direct cause of injury of the minor, to claim the Elders did not conduct a proper investigation of the Wygal concerns, as the Respondents' hindsight dictated, to claim the Elders' job description for Wolfe as intermediary between man and God could be second-guessed by the Respondents, to claim the Elders did not properly define the sacred communication of pastoral counseling for Wolfe, to claim the Elders were required to immediately destroy Wolfe as an effective counselor in the church by informing the entire congregation of the Wygals' concern at the very outset of its receipt and to claim the Elders were required upon the ultimately forced discharge of Wolfe to air the full particulars of their dissatisfaction with Wolfe to the entire congregation. This gambit of conduct by the Respondents as permitted by the Colorado courts in the trial of this case invaded and mutilated the religious beliefs and practices of the Bear Valley Church of Christ and they do not disappear by the mere statement of the Respondents that they did not take place.

II. Contrary to the Colorado Supreme Court and the Respondents in this case, the Colorado Court of Appeals found the Respondents' expert witnesses invaded religious beliefs.

The Colorado Court of Appeals, as set forth at pages 26-27 of the Petition found that the expert witnesses the trial court permitted to testify on behalf of the Respondents questioned the validity of Wolfe's beliefs concerning the efficacy of

touching as grounded in religious principles. The Colorado Court of Appeals also held the experts allowed establishment of a "professional standard for pastoral counseling, i.e., that a minor counselee should never be touched by any counselor" and was tantamount to imposing improper liability for "malpractice" for violations of a professional standard of conduct.

CONCLUSION

This case presents to the Supreme Court of the United States an opportunity to brightline its position concerning the effect of the First Amendment on churches and to outline the proper procedure for dealing with the claims against a church concerning allegations of a clergyman's sexual misconduct, which will be of great benefit to the multitude of jurisdictions which are being faced with this issue in an ever increasing number.

Dated this 5th day of May, 1997.

Respectfully submitted,

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